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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 84.

W. L. MATTHEWS, ET AL,

VS.

J. F. RODGERS, ET AL.

BRIEF FOR APPELLANTS ON RE-ARGUMENT

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PRELIMINARY STATEMENT

On the 2nd day of December, 1931, this case was argued and submitted to the Court. On December 14th, 1931, the Court made and entered an order restoring said cause to the docket for re-argument, limited to the questions of the jurisdiction of the District Court both with respect to the amount involved in the suit and the jurisdiction of the Court as a court of equity.

POINTS.

The argument for appellants will be presented under the following points, to wit:

I. There are no equitable grounds to sustain the jurisdiction of the Federal Court in equity, because

(a) Plaintiffs have a plain, adequate and complete remedy at law.

(b) The law of the State of Mississippi enlarging the right of injunction to restrain the enforcement and collection of an illegal tax cannot be enforced in the courts of the United States.

(c) The record affirmatively shows that plaintiffs would not suffer irreparable damages.

(d) The facts in the record are not sufficient to entitle plaintiffs to an injunction in order to prevent a multiplicity of suits.

II. The amount in controversy is less than $3,000.00 and, therefore, this Court is without jurisdiction.

BRIEF AND ARGUMENT.

I.

There Are No Equitable Grounds to Sustain the Jurisdiction of the Federal Court in Equity, because

(a)

Plaintiffs have a plain, adequate and complete remedy at law.

Section 267 Judicial Code (Section 384, Title 28, U. S. C. A.) provides as follows:

> "Suits in equity shall not be maintained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

Under the law in the State of Mississippi, a person may pay a tax which he contends is illegal or unconstitutional or excessive to the tax collector, whose duty it is to collect same, under protest and notify such officer that his contentions

are that said tax is illegal, unconstitutional, or excessive and that it is his intention to sue said officer for said tax; then, the tax payer has a right of action against such officer for the tax so paid.

I respectfully call the court's attention to the case of *J. J. Coulson vs. T. D. Harris*, 43 Miss. 728. On the 12th day of April, 1867, Coulson filed his bill of complaint in the chancery court of Rankin County, Mississippi, and obtained an injunction to restrain T. D. Harris, as sheriff and tax collector of said county, from collecting the sum of $709.25 for state and county taxes alleged to be due for the fiscal year ending on the 1st day of May, 1867. The complainant alleged that all of said taxes was illegal and that the tax collector claimed the right to collect $9.25 more than the amount of taxes assessed.

One defense interposed by the tax collector was that complainant had a plain, adequate and complete remedy at law and that the chancery court did not have jurisdiction over said cause. On page 744 of the text, the court held in reference to the $9.25, claimed to be in excess of the amount due that "the tax collector has no right to collect more than the amount of taxes, but should he do so, the tax payer is not without remedy. He may recover it back in an action of *assumpsit* for money had and received to his use."

In reference to the tax claimed to be illegal or unconstitutional, the court held that this question had never been determined by the court of the State of Mississippi and very carefully considered the matter and cites a number of cases from various jurisdictions in support of the law as stated

by the court. In the course of its opinion, page 750, the court states as follows:

> "The trustees of the city of Louisville having, by their by-law, laid a tax of one hundred dollars on each billiard table in said city, Gwathmey & Gretsinger, who had a billiard table in said city, filed their bill in chancery for an injunction to restrain the trustees from the collection of the tax, on the ground that they had, in levying such tax, transcended their authority. To this bill, the trustees demurred, but their demurrer was overruled; and on a final hearing, the court decreed a perpetual injunction. From which decree the trustees carried the case to the court of appeals. And that court in delivering their opinion, say: 'There is obviously no ground for the interposition of a court of equity in this case. If the trustees had authority to levy the tax, they might, no doubt, rightfully collect it; and if they had no such authority, and should attempt to coerce the payment of the tax by distress, they would be guilty of a wrong, for which a court of law would afford an adequate remedy. It is true that a court of equity will sometimes interpose to prevent a wrong, but it is done in general only where the wrong is in its nature irreparable in the modes of redress afforded by courts of common law; and that cannot be said to be the case in relation to the supposed wrong which is apprehended by the complainants.' The trustees of *Louisville vs. Gwathmey & Gretsinger*, 1 A. K. Marshall, 412.
>
> "If the assessment of a tax be in violation of law, it is a void act; the collector, in enforcing its collection, is a trespasser, and the purchaser acquires no title at the sale, and in general, the tax payer has a plain, full, adequate and complete

remedy at law. In the case of *Marr vs. Enlow*, 1 Yerger, 452, an action of trover was brought against the tax collector for personal property, which he had seized for the purpose of enforcing the collection of a tax which had been illegally assessed. The supreme court of Tennessee held that the action would lie. And the same doctrine was maintained in the case of the county court of *Obion vs. Marr*, 8 Humphrey, 634; Blackwell on Tax Titles, 156."

Tuttle vs. Everett, 51 Miss. 27.

In this case, Everett, a tax payer, brought suit in the court of a justice of the peace against Tuttle, the Tax Collector of Carroll County, Mississippi, to recover $73.37, the amount of taxes by him illegally paid. The justice court gave judgment for the plaintiff and the same result was had in the circuit court and the cause appealed by Tuttle to the Supreme Court. The court holds as follows:

"It is insisted on the part of the plaintiff in error that the taxes were voluntarily paid, and for that reason cannot be recovered back from the tax collector. This would be a correct legal proposition, where the property is properly taxable, and there was a mere irregularity in the levy or collection of the tax. But where the assessment and levy of the tax is illegal and void, the tax paid to the collector may be recovered back by the tax payer from the tax collector, whilst the same remains in his hands. This is in accordance with reason, principle and authority. Blackwell in his valuable work on Tax Titles says: 'Where a county or other local corporation levy a tax which is illegal, and the citizens pays the tax to one who

has a formel authority to collect it, the payment is not voluntary but compulsive, and an action will lie against the collector to recover it back, unless he has paid it over to his superiors, in which event the action must be brought against the corporation.' Blackwell, 187, top page, 4th ed."

And cites *Coulson vs. Harris*, 43 Miss. 751, supra, with approval.

City of Vicksburg vs. Butler, 56 Miss. 72.

The tax collector for the City of Vicksburg demanded of Butler the payment of a *privilege tax* to carry on his business in the City of Vicksburg. Butler contended that the tax was illegal and objected to the payment. The questions considered by the court in the case were, first, whether or not the tax was paid under protest and, second, whether or not it could be recovered from the City of Vicksburg. The court held as follows:

"Butler, in his testimony, states that the collector pressed him for the money,—called several times. The firm objected to the tax as illegal, and paid because of a threat to shut up their shop.

"The tax payers brought to the notice of the collector that the tax was illegal, and the money was paid to avoid the extreme measures which might have been taken against them. We do not think this, within the just principle applicable, was a voluntary payment.

"Some of the cases refer to a notice to the collector that suit will be brought to recover the money back. That notice is necessary, if the payer intends to sue the collector. After its receipt, if

he pays it over to the proper treasury, he does so at his risk, and does not relieve himself from responsibility. If, however, he pays over the money without such notice, suit can only be brought against his principal,—in this case the City of Vicksburg."

The court also cites with approval the holding of the court in *Coulson vs. Harris*, and *Tuttle vs. Everett*, supra.

I call the court's especial attention to the fact that the tax paid by Butler in this case was a privilege tax and that the court held that if he had given the tax collector notice that he claimed the tax was illegal and that he would sue him for its recovery, that he would have had a right of action against the officer.

Richardson vs. Scott, 47 Miss. 236.

This was a proceeding in equity to enjoin the collection of a tax. The complainant alleged in his bill as follows:

"That the said Henry P. Scott has never given any bond for the collection of said tax, other than his official bond as tax collector of said county, and that said Scott owns no property in said county subject to execution except one horse and some small articles of personal property of no value to any one except himself, and that he is insolvent and cannot respond in damages to your complainants for the trespasses about to be committed by him in attempting to collect said tax, or for collecting the same unlawfully."

The court held as follows:

"In *Coulson vs. Harris*, 43 Miss., this doctrine

is stated: 'If there is anything special in the case, anything which renders the remedy at law impossible or incomplete, as for example, when the trespasser is insolvent, * * * in such case chancery will put forth its restraining hand, and compel the wrong-doer to desist.'

"We are of the opinion that the foregoing rule correctly sets forth one of the true grounds of equity jurisdiction, and that it is applicable to and shall govern the case at bar, as it is presented in the record. It should be added, that to the bill there was a demurrer, which was sustained, and the bill dismissed. From that decree the complainants appealed to this court. Upon the allegation of the insolvency of the tax collector and the want of any bond for the faithful collection and payment of the tax in question, his case is brought within the doctrine of *Coulson vs. Harris*, supra, as to equity jurisdiction. The chancellor ought, therefore, to have entertained the bill in this case, and disposed of the questions involved upon their merits."

This case does hold that a person may enjoin the collection of an illegal tax when the bill alleges special facts which render the remedy at law impossible or incomplete. However, there are no such allegations in the bill in the case at bar.

The case of *Coulson vs. Harris*, supra, was also cited with approval in the following cases:

Maury vs. Smith, 46 Miss. 81;

Drysdale vs. Pradet, 45 Miss. 445.

Section 420 of the Code of 1930 provides as follows:

> "The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

This statute first appeared as Section 1831, Code of 1880. In October, 1884, the Supreme Court of this state decided the case of *Anderson vs. Ingersoll*, 62 Miss. 73, wherein the court held as follows:

> "If the appellee was aggrieved by the action of the board of supervisors in increasing the assessment of his property, he should have appealed to the circuit court as he was permitted to do by Section 504 of the Code of 1880. The board had jurisdiction of the matter on which its action was taken and any error committed in its exercise was correctable by appellee. The appellee having failed to avail himself of the remedy provided by the statute, cannot invoke the aiding of the chancery court."

This case was cited with approval in the case of *Board of Supervisors vs. Ames*, 3 So. Reporter, 37 (this case is not reported in the official reports), wherein the court held as follows:

> "As the improvements were put on the lot after the first of February, the increase of value therefrom was not taxable for the year 1886, but the plain, adequate and inexpensive remedy of appellee was to apply to the board of supervisors to reduce his assessment and if it refused his request, to appeal to the circuit court; and he had

no right to resort to chancery in the absence of special circumstances making such resort proper."

Under the holding of the court in these decisions, it is apparent that even in the state courts of the State of Mississippi the provisions of Section 420, Code of 1930, do not apply where the aggrieved taxpayer has an adequate remedy at law.

From the opinions of the Supreme Court of the State of Mississippi hereinbefore quoted and Section 420, Code of 1930, it affirmatively and conclusively appears that under the laws in the State of Mississippi, a taxpayer may contest the validity of the collection of a privilege tax in one of two ways: First, he may pay the alleged illegal or invalid tax under protest giving the tax collector notice at the time of the payment that he intends to sue him for its recovery and then bring his action at law against such officer for the amount of tax paid; second, if he have no adequate remedy at law, he may apply to a court of equity for injunctive relief without paying the alleged illegal or invalid tax in advance.

There are no allegations in the bill of complaint or in the record which show that plaintiffs could not have paid the tax of $100.00 levied by this statute in question and recovered it from the officer making the collection, provided, of course, the law in reference to protest, notice, etc. was followed:

Henrietta Mills vs. Rutherford County, 281 U. S. 121.

In this case, Henrietta Mills, a corporation, brought suit in the district court of the United States to enjoin Ruth-

erford County, in the State of North Carolina, from collecting a tax upon its property.

The law of the State of North Carolina, as quoted on page 125 of the opinion, and the decisions of the court as quoted on pages 126 of the opinion, show that the law of the State of North Carolina is practically the same as the law of the State of Mississippi. The court held in this case that under the laws of the State of North Carolina, the tax payer had an adequate remedy at law and that a court of equity had no jurisdiction to enjoin the county from the collection of the tax.

Arkansas Building & Loan Association vs. Madden, Secretary of State, 175 U. S. 159.

It appears from the opinion in this csae that the Building & Loan Association, an Arkansas corporation, qualified to do business in the State of Texas; that at the time it so qualified the annual franchise or license tax was $10.00; subsequently, the law was amended and required the corporation to pay a franchise or license tax of $205.00 annually. The Building & Loan Association contended that the statute levying the franchise or license tax of $205.00 was unconstitutional and brought action in the Federal circuit court of Texas for an injunction against the collection of the franchise tax. The court held as follows:

> "The penalty denounced on failure to pay is the forfeiture of the right to do business in the state, and complainant averred that if that forfeiture were declared it would be subjected to irreparable injury and to a multiplicity of suits.

"It is on these grounds of equity interposition that the aid of the circuit court was sought to restrain the discharge by a state officer of duties imposed on him by the law of the state, and to adjudicate as to the validity of that law.

"But the bill of complaint did not set forth any facts tending to show that complainant could not escape the forfeiture by payment of the $205.00 under protest, and recover back money so paid if the law should be held void.

"We assume that the payment would, under the circumstances detailed, be compulsory and not voluntary, and no reason is perceived why the rule permitting recovery back would not apply.

"That rule as applicable here is that an action will lie for money paid, under compulsion, on an illegal demand, the person making it being notified that his right to do so is contested."

This case is on all fours with the case at bar for the reason that the taxing statute levied a franchise or license tax in the sum of $205.00 and the penalty for failure to pay same was a forfeiture of its right to do business in said state. The court holds that it could have paid the tax and then brought its action to recover same. In the case at bar, plaintiffs are required to pay a tax of $100.00. For its failure there is a penalty in the sum equal to the amount of tax and the tax payer may be prosecuted criminally. However, the penalty and the prosecution may be escaped by the prompt payment of the tax.

A. T. & S. Railway Company vs. O'Conner, 223, U. S. 280.

In this case an action was brought to recover taxes paid under duress and protest, the plaintiff contending that the law under which the tax was levied is unconstitutional. The court held as follows:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, and action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizens refuses to pay. In these latter he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

* * * * * * * * * * *

"The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that the plaintiff disputed his right. If he had no right, as he had, not to collect the money his do-

ing so in the name of the state cannot protect him. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63,. See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum."

Allen, Comptroller of the State, v. Pullman Palace Car Company, 130 U. S. 658.

In this case bills were filed by the Pullman Palace Car Company to enjoin the Comptroller of the State of Tennessee from the collection of certain privilege taxes or license fees. The court held as follows:

> "So far as appeared, complainant could avert all the consequences which it depreciated as likely to ensue if the state officers were not restrained by complying with the terms of that statute and availing itself by the remedies thereby afforded. *Pickard v. S. C. Company*, 117 U. S. 34."

A. Shelton, Sheriff, v. Platt, 139 U. S. 591.

In this suit, Platt brought suit in the Federal circuit court against the sheriff of Hamilton County, Tennessee and J. W. Allen, Comptroller of the State of Tennessee, to

enjoin the collection of a license tax on behalf of himself and his associates who were too numerous to be joined as parties, in which it was alleged that the tax was unconstitutional. The court held as follows:

> "The trespass involved in the levy of the distress warrants was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction. But in addition to all this, since 1873 there has been a statute in existence in Tennessee providing a remedy at law, which has been pronounced by this court simple and effective. *Tennessee v. Sneed*, 96 U. S. 69 (24:610)."

Singer Sewing Machine Company v. Benedict, Treasurer, 229 U. S. 481.

This was a suit by the Singer Sewing Machine Company to enjoin the collection of taxes. The court held as follows:

> "We refer to these cases, not as defining the jurisdiction in equity of the circuit court, for that they could not do (*Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260, 261; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. Rep. 276; *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. Ed. 819, 838, 18 Sup. Ct. Rep. 418, but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the circuit court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. Ed. 624, 626; *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 487, 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them, and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows v. Chicago*, 11 Wall. 108, 112, 20 L. Ed. 65, 67; *State Railroad Tax Cases*, 92 U. S. 575, 613, 614, 23 L. Ed. 669, 673, 674; *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273, 276, 11 Sup. Ct. Rep. 646; *Allen v. Pullman Palace Car Co.* 139 U. S. 658, 661, 35 L. Ed. 303, 304, 11 Sup. Ct. Rep. 682; *Indiana Mfg.*

Co. v. Koehne, 188 U. S. 681, 686, 47 L. Ed. 651, 654, 23 Sup. Ct. Rep. 452."

Dalton Adding Machine Company v. State Corporation Commission, 236 U. S. 699.

This was an appeal from the Federal district court of Virginia to review a decree refusing to enjoin the threatened enforcement of a state statute requiring foreign corporations doing business in the state to obtain a license. The court held as follows:

> "The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article 1, Section 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states. 213 Fed. 889.
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> * * * * * * *
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> "We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is

not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. Sec. 720. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank v. Albright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Company v. Boise City*, 213 U. S. 276, 53 L. E. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Company v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

Ford Motor Company v. Chambers, Comptroller of California, 246 U. S. 647.

This was an appeal from the district court of the United States for the Northern District of California to review a decree dismissing a bill in the suit to enjoin the collection of a franchise tax, which judgment of the district court was affirmed with costs, upon authority of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269; *Boise Artesian Hot & Cold Water Company v. Boise City*, 213 U. S. 276; *Singer Sewing Machine Company v. Benedict*, 229 U. S. 481.

Gaar, Scott & Co. v. Shannon, 223 U. S. 468.

"Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment is treated as duress. It does not necessarily follow that there will be duress of goods. Or, if there is, the citizen to avoid the consequences of the duress, may pay the money, regain the use of this property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date, a penalty of 25 per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. *Swift & C. & B. Co. v. United States*, 111 U. S. 29, 28 L. Ed. 343, 4 Sup. Ct. Rep. 244; *Robertson v. Frank Bros. Co.*, 132 U. S. 23, 33 L. Ed. 238, 10 Sup. Ct. Rep. 5; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 329, 53 L. Ed. 1018, 29 Sup. Ct. Rep. 671; *Atchison, T. & S. F. Co. v. O'Connor*, decided this day. (223 U. S. 280, ante, 436, 32 Sup. Ct. Rep. 216.)"

In the case at bar plaintiffs must pay the tax before the first day of September or they will be liable for penalties and criminal prosecution. This makes the statute a self-executing statute and if the taxes were paid in order to escape the penalties and criminal prosecution, then it would be paid under duress and could be recovered back.

Bailey v. George, 259 U. S. 15.

Plaintiff filed a bill for injunction seeking to restrain the collection of amounts assessed under the Child Labor Tax Law. The court held as follows:

> "An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver 'that these, your petitioners, have exhausted all legal remedies, and it is necessary for them to be given equitable relief in the premises;' but there are no specific facts set forth sustaining this mere legal conclusion. Section 3224, Rev. Stat. Comp. Stat. Section 5947, 3 Fed. Stat. Anno. 2d ed. p. 1032, provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court'. The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstances not here averred or shown to make the provisions of the section inapplicable. *Dodge v. Brady*, 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 Sup. Ct. Rep. 277. In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest, then brought suit against the collector to recover the amount paid, with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy."

Under the law of this state when taxes are paid under protest to a tax collector, who has notice that the taxpayer intends to sue to recover the tax, he is liable regardless of whether he has paid, or will thereafter pay the money into

the State Treasury. However, Section 3278, Code of 1930, provides that he may be repaid. See Appendix Page 54.

> The Supreme Court of the State of Mississippi has held that this statute was constitutional and moneys might be refunded to the tax collector without an appropriation by the Legislature. See *Taylor v. Guy*, 119 Miss. 357.

It, therefore, appears that in the event the tax collector is required to refund money collected in illegal taxes, he would not be the loser. The state would reimburse him for the amount so paid.

It therefore clearly appears that plaintiffs have a full, complete and adequate remedy at law and that an injunction will not lie to enjoin the collection of taxes in this case.

POINT I.

There Are No Equitable Grounds to Sustain the Jurisdiction of the Federal Court in Equity, because

(b)

The Law of the State of Mississippi Enlarging the Right of Injunction to Restrain the Enforcement and Collection of an Illegal Tax Cannot Be Enforced in The Court of the United States.

Section 1831, Code of 1880, now Section 420, Code of 1930, confers jurisdiction upon chancery courts to restrain the collection of any taxes levied, or attempted to be collected, without authority of law.

As hereinbefore shown, this right cannot be exercised even in the state court where the complainant has an adequate remedy at law. See the following cases:

Anderson v. Ingersoll, 62 Miss. 73;

Noxubee County v. Ames, 3 So. 37, supra.

Appellees contend that this equitable jurisdiction may be enforced in the Federal Courts.

Henrietta Mills v. Rutherford County, 281 U. S. 121.

This case was filed by the Henrietta Mills to enjoin the collection of a tax and contended that a state statute authorizing the issuance of an injunction by a state court could be exercised by the Federal court. The court held as follows:

> "The contention is that the state statute authorizing a proceeding in the state court for an injunction created an equitable right which should be enforced in the Federal court. It is true that where a state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction. *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123, 127; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503, 520, 22 L. Ed. 599, 605; *Holland v. Challen*, 110 U. S. 15, 24, 25, 28 L. Ed. 52, 55, 56, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 552, 557, 30 L. ed. 1010, 1012, 7 Sup. Ct.

Rep. 1129; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. Ed. 909, 913, 10 Sup. Ct. Rep. 554; *Lawson v. United States Min. Co.*, 207 U. S. 1, 9, 52 L. Ed. 65, 73, 28 Sup. Ct. Rep. 15; *Pusey & J. Co. v. Hanssen*, 261 U. S. 491, 498, 67 L. Ed. 763, 771, 43 Sup. Ct. Rep. 454. But the enforcement in the Federal Courts of new equitable rights created by states is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. This court said in *Scott v. Neely*, 140 U. S. 106, 110, 35 L. Ed. 358, 360, 11 Sup. Ct. Rep. 712, that 'whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity'. *Whitehead v. Shattuck*, 138 U. S. 146, 152, 34 L. ed. 873, 874, 11 Sup. Ct. Rep. 276; *Wehrman v. Conklin*, 155 U. S. 314, 323, 39 L. ed. 167, 172, 15 Sup. Ct. Rep. 129. Whatever uncertainity may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, can not enlarge the right to proceed in a Federal court sitting in equity, and the Federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. *Pusey & J. Co. v. Hanssen, supra.*".

I think this case is conclusive on this proposition.

POINT I.

There Are No Equitable Grounds to Sustain The Jurisdiction of the Federal Court in Equity, because

(c)

The Record Affirmatively Shows that Plaintiffs Would Not Suffer Irreparable Damages.

The argument made under Point I. A. is applicable to this point. If the appellees have an adequate remedy at law as argued in said point, then they could not suffer irreparable damages. The only damage that could possibly be suffered by them is the sum of $100.00 and this can be recovered in a suit at law.

Appellees cannot arbitrarily refuse to pay the license tax levied by the statute in controversy and incur penalties and crimnial liability and then claim that their damages are irreparable. It is the legal duty of the plaintiffs to pay the tax and sue for its recovery.

POINT I.

There Are No Equitable Grounds to Sustain The Jurisdiction of the Federal Court in Equity, because

(b)

The Court does not Have Equitable Jurisdiction on the Ground of Multiplicity of Suits.

This suit is brought by a number of plaintiffs seeking the same relief. However, when jurisdictional matters are

considered it must appear that each plaintiff has alleged facts so as to show the necessary jurisdictional facts, that is, each plaintiff must show jurisdiction.

There can be no multiplicity of suits in this case. Each plaintiff may follow his adequate remedy at law as shown hereinbefore in this brief, in which event he would pay a tax of $100.00 and bring his suit therefor.

However, if he fails or refuses to do this he would be liable to one civil suit for the tax and penalty, and to one criminal prosecution for failure to pay the tax.

Under the law of this State a person must make application for and pay his privilege license before he begins business. In the event he fails to do so and the license tax is later collected, it is dated as of the time he began business and is good for one year from said time. He is liable for only one tax and the penalty for one year.

In the event he fails to pay the tax when due, then he has violated the criminal law and may be prosecuted for his failure. However, he cannot be prosecuted but one time for failure to pay the tax. He could plead former conviction or acquittal in case he was prosecuted more than once for failure to pay the tax in any one year.

It is clear then that taking the case of each plaintiff that he could not be subjected to more than two suits—one civil suit for the tax and penalty, and one criminal suit for violating the law, and in the event he pays the tax, then only one suit is necessary to determine his liability.

In the original brief in this cause, counsel for appellees cite Pomeroy's Equitable Remedies, Volume 1, Section 272, page 658, and quotes therefrom as follows:

> "MULTIPLICITY OF SUITS.—This ground of jurisdiction has met with abundant recognition in cases of the 'Second Class', and of the 'Fourth Class'; but appears to have been rejected in one case of the 'Third Class', where the equity arises from the fact that the burden of an illegal tax falls on numerous inidividuals in the same way. This class is, at any rate, confined to cases where the tax as a whole is invalid, and in any event the jurisdiction is asserted to prevent a probable, not a possible, multiplicity of suits."

He also cites *Fairley v. Duluth*, 150 Minn. 374, 32 A. L. R. 1258, and quotes therefrom as follows: (Page 1267)

> "By the great weight of authority several taxpayers affected in a similar manner by an illegal tax or license fee may join in a proceeding in equity to restrain the enforcement of the tax and for such other relief as the nature of the case represented may require provided it is common to all of them," citing *King v. Wilson*, I Dill., 555, Fed. Cas. No. 7, 810; *Risley v. Utica*, 173 Fed. 502, appeal dismissed in 100 C. C. A. 688, 177 Fed. 1005."

It is clear that neither of these authorities sustain the contention of appellees herein.

The record in this case shows that there are several classes of cotton buyers—some who do an intrastate business, some who do both an intrastate and an interstate business, and perhaps some who do only an interstate business.

The statute in controversy is clearly not unconstitutional when applied to persons engaged in intrastate business. In the case at bar the Lower Court held that the statute was unconstitutional only when applied to interstate business. It appears, therefore, then that the statute is not illegal and the taxes levied thereby is not unconstitutional in all cases. In case cotton buyers pay the tax and sue for its recovery, or in case they fail to pay the tax and the State sues for the tax, the issue will be whether or not that particular cotton buyer is engaged in intrastate commerce or interstate commerce. If he is engaged in intrastate commerce the State will prevail, and if in interstate commerce the taxpayer will prevail.

The record shows that that was one of the difficulties encountered in the trial of this lawsuit. When it came to taking proof to sustain the allegations of the bill, it would have been necessary for each plaintiff to prove his "course of business" in order that the Court might determine whether that particular individual or firm was engaged in intrastate commerce or interstate commerce. The Court below specifically limited the injunction to the parties to this lawsuit. If indeed and in fact the statute had been unconstitutional and the tax illegal, then the Court would have enjoined the officers of the State from enforcing said statute against all persons engaged in buying and selling cotton in the State of Mississippi.

It further appears that a multiplicity of suits in a case of this character would be even more burdensome to the State and county officers than to the plaintiffs in this case. It would certainly not be to the best interest of the State for

a number of lawsuits to be filed and tried until the principles of law are established by the courts of higher jurisdiction. It might be conceded that under the facts in this case there is a possibility of a multiplicity of suits, yet there is little probability of a multiplicity of suits.

The case of *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, was a suit to enjoin the collection of a privilege tax in the sum of $300.00 to be paid the first day of each and every month, and the bill also alleged that the municipal authorities were threatening to tear up or destroy the pipes of the company in the streets of the municipality. The Court held as follows:

> "The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.
>
> "But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties. * * * * *

"Nor do we think there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought and that by direction of the city council. It remains pending, and when it reached judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3d ed., Sec. 254."

In *Dalton Adding Machine Co. vs. State Corporation Commission*, 236 U. S. 698, the Court held as follows:

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. *Rev. Stat.*, Sec. 720. *Brentis vs. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general prin-

ciple is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank vs. Allbright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 23 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. vs. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfgy Co. vs. Koene*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

In the case of *Cave vs. Randolph*, 287 Fed. 989, the Federal Court held as follows:

> "Nor does the possibility of the multiplicity of arrests and trials in such cases pending a final decision of the question avail to bring the issue within the jurisdiction of equity."

In the case of *St. Louis I. M. & S. R. Co. vs. McKnight*, 244 U. S. 368, the Railroad Company sought to enjoin certain shippers and travelers from suing the railroad company on account of a controversy over the rates; that is, the railroad company had charged a rate in excess of that claimed to be due by the shippers and travelers. A great number of these claims were involved. The Court held as follows:

"The only common issue between the railway company and the several shippers and travelers (namely, whether the rates promulgated by the Railroad Commission were confiscatory) had been settled by the decision of this court. In no other respect have shippers and travelers a common interest. The claims of each present a seperate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact which will arise in considering their several claims."

In the case of *Francis vs. Flinn*, 118 U. S. 389, the plaintiff sought the aid of a Court of equity to enjoin the officers and certain citizens of Louisiana from interfering with its piloting business. The Court held as follows:

"The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongully interfered with by the defendants or others, he can prosecute them for this wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If

the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

"We think the court below should have sustained the demurrer of the defendants for want of equity in the bill."

In *Dows vs. Chicago*, 78 U. S. 112, a bill for injunction was filed by Dows, the owner of stock in the Union National Bank, in which the validity of a tax on national bank stock was questioned. Of course, there were not only a number of stockholders in this particular bank interested, but also all stockholders in the national banks of the State of Illinois were interested in said suit. However, the Court held that the Federal Court did not have jurisdiction to restrain the collection of the tax in this case, the Court holding as follows:

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

This is an old case and one of the leading cases on the subject, and has been followed and cited in almost every

case of importance involving the jurisdiction of a court of equity since said time.

The Federal courts have always refrained from taking jurisdiction in cases to enjoin the collection of state taxes, except when complainant makes the case free from doubt and under some well recognized rule of equity.

If this case can be sustained on the ground of multiplicity of suits, then there would be few, if any, cases in which the Court would not have jurisdiction to enjoin the collection of state taxes. There are very few statutes that would levy a tax on one or a few individuals. Most taxes would apply to a group or class or large number of individuals. The fact that a statute authorizes the collection of a tax from a number of individuals is not sufficient to give a court of equity jurisdiction. This is especially true in a case of this kind where the statute is admittedly constitutional, but the question involved is merely one of application.

THE STATUTE IN CONTROVERSY IS ADMITTEDLY VALID.

Plaintiffs contend that they are engaged solely in interstate commerce and when the statute is applied to persons engaged in such business, then it is unconstitutional and void. The Court below held that the statute was unconstitutional only when applied to persons engaged in interstate commerce.

Article XI of the Constitution of the United States is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law, or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

An injunction to restrain a state officer from enforcing a valid state statute is a suit against the state and cannot be maintained.

Poindexter vs. Greenlaw, 114 U. S. 210;

Fitts vs. McGehee, 172 U. S. 516;

Arbuckle vs. Blackburn, 113 Fed. 616, 191 U. S. 405;
Francis vs. Flinn, 118 U. S. 385;

Dalton Adding Machine Co. vs. State Corporation Commission, 236 U. S. 698.

In the latter case the Supreme Court of the United States held as follows:

> "The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article I, Paragraph 8, of the constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer ir-

reparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states.

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of a court protected from interference on the part of the courts of the United States. *Rev. Stat.* Sec. 720. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 20 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performnig their statutory duty for fear that they should perform it wrongly. *First Nat. Bank v. Albright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452.

"The interpretation of valid criminal statutes of the state is a matter within the exclusive jurisdiction of the state courts, and the Federal courts

follow the interpretation of the state courts of last resort in such matters."

Central Consumers Co. v. Austin, 238 Fed. 616.

In *Hoffman Brewing Company v. M'Elligott*, 259 Fed. 525, it was held that a Federal District Attorney cannot be enjoined from instituting criminal proceedings, against concerns manufacturing and selling non-intoxicating beer on the ground that the attorney had transcended his authority by invoking the act against intoxicating liquors.

In *Harkrader v. Wadley*, 172 U. S. 148, the Supreme Court held as follows:

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia, and the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in *Re Ayres*, 123 U. S. 443, 497, 931; 216, 227: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

I, therefore, most respectfully submit that this Court has no jurisdiction to restrain the enforcement of the statute levying the tax about which plaintiffs complain.

II.

THE AMOUNT IN CONTROVERSY IS LESS THAN $3,000.00 AND, THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

The bill in this case seeks to enjoin the collection of a privilege or license tax in the sum of $100.00. The appellants here contend that the amount of such tax is the amount in controversy; that is, the only amount in controversy is the sum of $100.00.

Appellees concede that if the amount of the tax is the amount in controversy then the amount in controversy is less than $3,000.00, and this Court is without jurisdiction.

Appellees contend that the right of plaintiffs to do business is worth more than $3,000.00 and that the rights of plaintiffs to do business is the amount in controversy. Appellants concede that if the right of appellees to do business is the measure of the amount in controversy, then such amount is more than $3,000.00, and this Court has jurisdiction.

As shown in the argument under Point 1 (a) of this brief, the taxpayers in this case had the right and in fact it was their duty to pay the tax under protest and notify the officer of their intention to sue, and sue for the recovery of the tax so paid. This, then must be the amount in controversy. The taxpayers could escape all the penalties, lia-

bility to criminal prosecution and carry on their business in the usual and ordinary way in the event this tax was so paid.

In this case the value of plaintiff's rights to do business is fixed by law at $100.00 per annum. If this amount is paid then there can be no question but that plaintiffs would have the right to do business.

The law is well settled that when a suit is filed to enjoin the collection of an ad valorem tax, the amount of the tax is the amount in controversy. An ad valorem tax is really nothing more or less than a privilege tax for the privilege of using, enjoying and disposing of property. If a person fails to pay an ad valorem tax he loses possession of and title to his property.

If the ad valorem tax on real estate is less than $3,000.00 and such real estate is worth more than $3,000.00, the Court will not enjoin the collection of the tax because the tax is the amount in controversy and it is not $3,000.00, nevertheless, if the owner of the property refuses to pay the tax on the theory that it is illegal or unconstitutional, and the land is sold for its collection, and the Courts afterwards hold that the tax was valid and constitutional he loses the property. In other words, the loss on account of his failure to pay tax is more than the amount in controversy.

I am unable to see any distinction between that class of cases and the one at bar. The tax is, of course, the amount in controversy, for this is the amount that the plaintiffs may pay and secure all the rights for which they are contending.

Plaintiffs' prayer for an injunction (R. 16 is as follows: To restrain defendants, or either of them, "from collecting or seeking to collect from the plaintiffs the said privilege or occupation tax and/or said damages as provided by Chapter 88, Laws of State of Mississippi 1930."

The prayer further is that "it be adjudicated and determined that they have the right to engage in their said business free of the burdens placed thereon by said Chapter 88, Laws of 1930."

It is clear from this prayer that the only relief sought is the relief from the payment of the privilege tax thereby levied, and it is absolutely clear that if the collection of this tax is restrained, then none of the other things prayed for could happen. If the tax is paid, then plaintiffs are relieved of all further liability. The prayer of the bill shows clearly that the relief sought is nothing more nor less than to restrain the collection of the privilege tax levied by said section. If said officers could not collect the tax they certainly could not prosecute plaintiffs for failure to pay it, neither could they levy distress on property to pay it.

There appears to be a number of cases wherein this Court has decided what is and what is not the amount in controversy. A number of these cases are cases in which it was sought to enjoin the collection of taxes. In almost, if not all of these cases the Court holds that the amount of taxes is the amount in controversy. In other words, the decision of this Court seems to be uniform that where by the payment of a certain fixed sum the plaintiff to the suit

may relieve himself of all liability, penalties, etc., then the amount of such sum is the amount in controversy.

There is another line of cases which states the facts in each case and determines therefrom what the amount in controversy is. In most, if not in all of these cases, the plaintiff could not pay a certain fixed sum or perform a certain duty and obtain the relief asked for in such suits.

In *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, the telegraph company sought to enjoin the collection of certain taxes. It appears from the reported case that the taxes against the telegraph company were assessed in each county. The Court held that the telegraph company could not combine the taxes in the separate counties, and unless the tax in one county was more than the jurisdictional amount, then the suit must fail.

See also *Walter v. Northeastern R. R. Co.*, 147 U. S. 370.

In *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68, it is held that a suit to restrain the collection of taxes not exceeding $2,000.00 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of the Circuit Court of the United States.

This case further holds that future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

In *Citizens Bank of Louisiana vs. Cannon*, 164 U. S. 319, the Court held that in a suit by a bank to enjoin the

collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount, will not give jurisdiction.

In the case of *Cole vs. Norborne Land Drainage District*, 207 U. S. 45, the Supreme Court held that in a suit to enjoin the collection of a tax for drainage benefit on the ground of the unconstitutionality of the statute that the assessments against each of them was less than the jurisdictional amount and the suit could not be sustained.

The tax for the current year and not for future years controls in a case to enjoin the collection of a tax.

See *Citizens Bank v. Cannon*, 164 U. S. 319.

In *Turner v. Jackson Lumber Company*, 218 U. S. 685, the Supreme Court held that the amount in controversy was the amount of taxes in dispute, and that unless this was more than the jurisdictional amount, the Court would not have jurisdiction.

In *Lion Bonding Company v. Karatz*, 262 U. S. 77, the Supreme Court held that a plaintiff who sued on his own behalf and on behalf of other persons similarly situated, that the amount in controversy was the amount claimed by each plaintiff, and not the aggregate amount.

In *Scott v. Frazier*, 253 U. S. 243, the Supreme Court held:

"There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin Co.*, 239 U. S. 62.

"In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court cannot be maintained where such separate interests are below the jurisdictional amount.

Ex Parte Baltimore, etc. R. Co., 106 U. S. 5;

Adams v. Crittenden, 106 U. S. 576;

Schewd v. Smith, 106 U. S. 188;

Elgin v. Marshall, 106 U. S. 578;

Ogden v. Armstrong, 168 U. S. 224;

Chamberlain v. Browning, 177 U. S. 605."

In *Packard vs. Banton*, 264 U. S. 140, a statute of the State of New York required persons operating motor vehicles to file a bond with personal or corporate sureties thereon. The bill alleged that it operated four motor vehicles and that the insurance companies required a premium of $960.00 for each motor vehicle. The bill further alleged that the income from each of said vehicles would be reduced $18.50 each per week. The Court held as follows:

"Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000.00. Judicial Code, Section 24, Subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000.00, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485; 17 L. Ed. 311; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, 552; *Nashville C. & St. L. R. Co. v. McConnell*, 82 Fed. 65, 73; *Scott v. Donald*, 165 U. S. 107, 114, 41 L. Ed. 648, 653, 17 Sup. Ct. Rep. 262; *Hutchinson v. Beckham*, 77 C. C. A. 333, 118 Fed. 399, 402; *Evenson v. Spaulding*, 9 L. R. A. (N. S.) 904, 82 C. C. A. 263, 150 Fed. 517, 520; *Hunt v. New York Cotton Exch.*, 205 U. S. 322, 336, 51 L. Ed. 821, 826, 27 Sup. Ct. Rep. 529.

"Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount."

It is clear from the facts in this case that it cost the operator of these motor vehicles more than $3,000.00 a year to comply with the said statute.

The amount to be paid under the New York statute would necessarily have to be paid to the insurance or surety company, and there, of course, would be no way by which the plaintiffs could recover the amount so paid. In the event the plaintiff complied with the law it could not sue the surety company for the return of its premium. In other words, the plaintiff would not have an adequate remedy at law, and in order to comply with the statute it would cost the plaintiff more than $3,000.00.

This is the holding of the Court in practically all of the cases cited in support of this decision.

In *Hunt vs. New York Cotton Exchange*, 205 U. S. 322, the New York Cotton Exchange filed its bill in equity in the Federal Court seeking to restrain a citizen of Tennessee from using the ticker service of a telegraph company. It appears that the New York Cotton Exchange had a contract with the telegraph company in which the exchange furnished the company the daily quotations on the cotton market; that the purpose of the contract was to control the distribution of the information furnished by the exchange.

Hunt, the appellant, prior to the expiration of this contract, had been receiving this information from the telegraph company. He had sought to enjoin the telegraph company from taking the service out of his place of business.

The purpose of the suit was to control the distribution of the information given by the exchange. The record shows that this right was worth more than $2,000.00. It further showed that the price to be paid the telegraph company under its contract with the exchange was less than $2,000.00. The Court held that the value of the right to control the market quotations was the amount in controversy.

The Court held as follows:

> "It is manifest that the injury to the exchange is not the rate paid by the appellant to the telegraph company. The purpose of the suit is to enjoin the appellant from receiving, using, or selling, directly or indirectly, the exchange's quotations, or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them, either by contract of purchase from the exchange, or, with its consent and approval, from one of the [redacted]raph companies, authorized to distribute them. [redacted]other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops."

In this case the plaintiffs could not escape the damages caused by a breach of its contract with the telegraph company by the payment of a fixed sum, neither could it recover the amount of damage caused to it by the breach of said contract.

In *Scott v. Donald*, 165 U. S. 107, the bill was filed in

equity by the plaintiff against various persons claiming to act as constables of the state of South Carolina, under what is known as the "Dispensary Law." An injunction was sought to protect the right of the plaintiff to import, for his own use, ales, wines, and liquors, the products of other states and foreign conutries. It was alleged in the bill that on several occasions packages of such wines and liquors belonging to complainant had been seized and carried away, and that complainant had instituted suits at law, and that notwithstanding such suits the constables of South Carolina continued to seize and carry away packages belonging to the complainant, and that protection of the complainant's right by actions at law involved, and would involve, a multiplicity of suits against the constables, and that the right to import wines, liquors, and other spirits was of the money value of upwards of $2,000.00, and also that articles to be imported in the future by the complainant from time to time were threatened to be seized by the constables, and that the value of these would exceed the sum of $2,000.00. The Court held in this case that the right of complainant to import wines, etc., was the amount in controversy. However, the officers of South Carolina denied that plaintiff had any right whatever to import any goods of this character. In other words, the State was acting to prevent the plaintiff from carrying on its business. The plaintiff could not, as in the case at bar, have secured this right by the payment of a small privilege tax.

In *Bitterman vs. L. & N. R. R. Co.*, 207 U. S. 204, it appears that the Railroad Company issued round-trip tickets; that such tickets were not transferable. Bitterman was engaged in the business of buying these tickets

and selling them to persons not entitled to receive them, and aiding the purchasers in the illegal use of them.

The Railroad Company sought to enjoin Bitterman from buying and selling these tickets. The Court held that the right of the railroad company to control the sale and use of tickets issued by it was the amount in controversy. In this case the railroad company could not, as plaintiffs could in the case at bar, stop Bitterman from his illegal traffic in railroad tickets by the payment of a fixed sum. See also *N. & P. Ry Co. vs. Walker*, 148 U. S. 391.

In the case of *City of Huchinson vs. Beckham*, 118 Fed. 399, Beckham sought to enjoin the City from the collection of a privilege tax which was less than $2,000.00 a year. The City contended that the amount in controversy was the amount of the tax, and was less than $2,000.00. The Court holds as follows:

> "Our attention has been invited to several cases which were brought to enjoin the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (*Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1; *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Railroad Co. v. Walker*, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494); but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which, if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable

> from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning tis employes and by daily arrests that will seriously interfere with the prosecution of complaints' business, and inflict a much greater direct loss than the amount of the tax."

The Court does not hold, as in the case at bar, that plaintiff could have escaped the penalties, criminal liabilities, etc., by the payment of a tax and have an adequate remedy at law to collect the same. However, this case is easily distinguishable from the case at bar, because under the statute in controversy only one penalty could be incurred and only one criminal prosecution could be had for failure to pay the tax.

In *Gramling vs. Maxwell,* 52 Fed. 2nd Series, 256, the statutory court held that in a suit to enjoin the collection of a privilege or license tax, the amount of the tax was the amount in controversy, and cites in support thereof the following cases:

Wheless vs. St. Louis, 188 U. S. 379;

Russell vs. Stansel, 105 U. S. 303;

Georgia Power Co. vs. Hudson, 49 Fed. 2nd, 66.

In *Berryman vs. Whitman College,* 222 U. S. 334, the College had been granted by contract perpetual existence and exemption from the payment of a tax. Twenty-three

years after the contract was made it was attempted to levy a tax on the property of the College. The suit was to enjoin the levy and collection of the tax on the ground that the contract had been violated. The Court held in this case that future taxes would be counted in determining the amount in controversy, or rather it held that the injunction was to prevent a breach of the contract, and the rights of the College under the contract determined the amount in controversy. The Court held as follows, and cited the following cases in support of its opinion:

> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and duty to protect the contract right, and in the nature of things causes jurisdiction for such purpose to be measured by the value of some mere isolated element of that right."

New Orleans & Citizens Bank, 167 U. S. 371;

Deposit Bank vs. Frankfort, 191 U. S. 499.

However, the Court recognized that where the suit was to enjoin the collection of a tax and no contract was involved that the measure of damages was the amount of the tax, and cited the following cases so holding:

Holt vs. Indiana Manufacturing Co., 176 U. S. 68;

Clay Center vs. Farmers L. & T. Co., 145 U. S. 224;
New England M. S. Co. vs. Gay, 145 U. S. 123;
Citizens Bank vs. Cannon, 164 U. S. 319;
Rude vs. Westcott, 130 U. S. 153;
Walter vs. Northeastern R. Co., 147 U. S. 370.

I most respectfully submit that under the holdings of this Court the amount in controversy in this suit is the amount of the tax for each taxpayer, and this amount is less than $3,000.00, and this Court, therefore, has no jurisdiction.

CONCULSION.

I, therefore, most respectfully submit that this Court does not have jurisdiction because there are no equitable principles involved, and because the amount in controversy is less than $3,000.00.

Resptctfully submitted,

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Attorney General,
Attorneys for Appellants.

APPENDIX A.

AN ACT to revise the Privilege Tax laws of the State of Mississippi and to repeal all laws in conflict therewith, and to provide penalties.

Section 3. PRIVILEGE TAXES IMPOSED.—Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, before commencing same, apply, for, pay for, and procure from the proper office a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the businesses set out therein.

SEC. 56. COTTON BUYERS.—Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a priv-

ilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or municipal privilege tax.

But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes.

SEC. 220. TAXPAYER TO APPLY FOR LICENSE.—Every person required to obtain a license for the privilege of engaging in any business for which a privilege tax is required shall make application therefor in writing to the officer who is required to collect the tax; which application shall be made on the form prescribed by the State Auditor of Public Accounts, except as otherwise provided by law, and which shall contain all the information necessary for the officer collecting the tax to properly classify the applicant or to ascertain the amount of tax due. The application shall be sworn to by the taxpayer, or any officer or duly authorized agent of the said taxpayer, which oath may be administered by any officer required by law to collect a

privilege tax. The application shall be accompanied by the amount of the privilege tax required by law. Any person who shall wilfully make any false statement in an application for a privilege license shall be guilty of a misdemeanor, and on conviction thereof shall be required to pay as damage double the amount of the difference between the tax paid and that which should have been paid, in addition to the fine and/or imprisonment imposed. The officer taking the application for privilege license shall carefully preserve the same for the use of the grand jury, the courts of the state and/or any duly authorized officer of the State of Mississippi. And any officer who shall refuse or wilfully fail to take or require the application or affidavit herein required shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 224. OFFICER TO NOTIFY ALL PERSONS LIABLE FOR PRIVILEGE.—On or before the first day of each month the collector shall mail to each privilege taxpayer holding an annual license and whose license will expire during the following month, as shown by his record, a notice, that his license will expire and that a new privilege license must be procured during the said following month, and shall enclose therewith an application blank for a new license; but the failure to send or to receive such notice shall not exempt such privilege taxpayer from any penalties prescribed by law.

SEC. 225. DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by

law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax penalty, issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: "Collected as Damages"; and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 242. PENALTIES.—Any person violating any of of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitations aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this chapter (act). The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section.

Section 3278, Code of 1930.

"Where any sheriff or tax collector has, or shall hereafter, by mistake or oversight, erroneously pay into the state treasurer any moneys on account of ad valorem or privilege taxes, such of-

ficer may make application to the auditor for repayment of such taxes, and the auditor and attorney-general shall thoroughly investigate such claim, and if found to be due the attorney general shall so certify to the auditor, who shall draw his warrant in favor of such sheriff, to be paid out of same fund in which it was erroneously paid into the state."

APPENDIX B.

The case of *Kroger Grocery and Baking Company v. John B. Lewis, et al.*, in the District Court of the United States for the Eastern District of Kentucky, was tried before a statutory court organized under Section 266 of the Judicial Code, before Moorman, Circuit Judge of the 6th Circuit, and Cochram and Dawson, District Judges, and decided on November 6th, 1931. This case has not yet been officially reported.

The court states the case as follows:

"In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

"At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

" 'No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved tax payer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed'."

The court held that said statute was a plain, adequate and complete remedy at law and the Court was without equity jurisdiction.

Plaintiffs also contended that a court of equity had jurisdiction because of a multiplicity of suits and because it would suffer irreparable damages if it proceeded in an action or actions at law. However, the court held as follows:

> "Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—
>
> "'A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.'
>
> "This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal

principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276; *Standard Oil Co. v. Atlantic Coast Line Co.*, 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

"Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayor is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

"We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss the want of equitable jurisdiction must be sustained."

Appellants herein contend that this case sustains the

contention of appellants in argument under Points I-A, C, and D, and cite said cause in support of said contention.

Respectfully submitted,

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